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IN THE

Supreme Court of the United States

CRAIG OUTDOOR ADVERTISING, INC., CURTIS MASSOOD, MIDWEST OUTDOOR MEDIA, LLC, AND PATRIOT OUTDOOR, LLC, PETITIONERS

v.

VIACOM OUTDOOR INC., WALLY KELLY AND HAROLD GUSTIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

THE PETITION SHOULD BE GRANTED 1

I. The District Court and the Eighth Circuit Both Redrafted the RICO Statute's "Enterprise" Requirement; the Courts' Respective Determinations Constitute Pure Legal Errors in Conflict with this Court's Precedent 1

II. The Eighth Circuit's Decision Creates a Clear Circuit Split 6

III. The Eighth Circuit Usurped the Jury's Fact-Finding Role and Ignored Key Evidence the Jury Relied Upon because of the Court of Appeals' Open Hostility to RICO 9

IV. Equitable Standing Is Required to Uphold the Broad Remedial Protections of RICO 12

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Baker v. IBP, Inc., 357 F.3d 685 (7th Cir. 2004) 8
Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 2145 (2008) 11
Galloway v. United States, 319 U.S. 372, 395 (1943) 10
Miller v. Steinbach, 268 F. Supp. 255, 267 (S.D.N.Y. 1967) 12
United States v. Orena, 32 F.3d 704 (2d Cir. 1994) 6, 9
United States v. Turkette, 452 U.S. 576, 583 (1981) 3, 4, 5, 6
Williams v. Mohawk Industries, Inc., 465 F.3d 1277 (11th Cir. 2005) 6, 7, 8

STATUTES

18 U.S.C. § 1961(4) 4
18 U.S.C. § 1962 4

RULES

Supreme Court Rule 33.1(d) 14
Supreme Court Rule 33.1(h) 14

THE PETITION SHOULD BE GRANTED

The response of Viacom Outdoor, Inc. ("Viacom") makes inaccurate and misleading statements regarding the district court's holdings, misrepresents the Eighth Circuit's analysis of the association-in-fact enterprise, and ignores the critical holdings of this Court's prior decisions. It also whitewashes the gaping circuit split the Eighth Circuit created and does not discuss the Eighth Circuit's remarkable substitution of its own results-driven fact-finding for the jury's verdict. The response offered by Gustin and Kelly defends the Court of Appeals' fact-finding, but urges this Court to overlook it. This Court should grant the petition to correct the Eighth Circuit's rewriting of the RICO statute's "enterprise" requirement, to resolve the circuit split created by the Eighth Circuit's opinion, and to restore a reasonable jury verdict that was supported by substantial evidence.

I. The District Court and the Eighth Circuit Both Redrafted the RICO Statute's "Enterprise" Requirement; the Courts' Respective Determinations Constitute Pure Legal Errors in Conflict with this Court's Precedent

First, the district court did not dismiss the RICO counts against Viacom "on the ground that record evidence failed to establish" an association enterprise. Viacom Resp. Br. at 1 (citing Pet. App. 53a-55a). Rather, it found that the allegations in the complaint failed to allege a common *fraudulent* purpose. Pet. App. at 54a (holding that "an association-in-fact

enterprise cannot consist of innocent participants" and that such an enterprise must have a "common purpose to engage in a particular fraudulent purpose"). The district court's holding in this regard was not a factual one; it was a legal determination arising from pre-trial motion practice.[1] The district court incorrectly rejected Petitioners' argument—supported by this Court's precedent—that the RICO statute merely requires a common purpose to establish an association-in-fact enterprise. Pet. App. at 54a. Instead, the district court imposed an additional requirement—that the common purpose must be fraudulent. *Id.*

Second, the Eighth Circuit did not determine whether the district court's imposition of the "fraudulent" requirement was proper. Pet. App. 39a. Rather, the Eighth Circuit held that "divergent goals" among members of a purported association-in-fact enterprise is a "'fatal problem' to a RICO claim," and imposed its own additional requirement that the members of a RICO enterprise must have *all* purposes in common. Pet. App. 41a. The Eighth Circuit ignored the legal nature of the district court's association-in-fact determination. Instead it noted its own "disagree[ment] with [the complaint's] characterization" of the common purpose alleged by Petitioners and cherry-picked among the allegations in the complaint to support its position that the common purpose alleged by Petitioners—"leasing property

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[1] The district court made its determination in the context of a motion for summary judgment but, because it relied exclusively on the allegations in the complaint, the district court made no factual determinations based on the evidentiary record; its holding was purely legal. Pet. App. 54a.

owned by the railroad to outdoor billboard businesses"—was not a "sufficient" common purpose. Pet. App. 40a-41a.

The Eighth Circuit is not free to pick and choose amongst the allegations in the complaint to determine whether there was a common purpose of the association between Viacom and its three client railroads. The Eighth Circuit was obliged to consider *all* allegations in the complaint. But the Eighth Circuit ignored the allegation—which Petitioners established at trial—that all three of the client railroads and Viacom had a *contractual relationship*, the common purpose of which was "[to] engage[] in a course of conduct," namely to "leas[e] property owned by the railroad to outdoor billboard businesses." Pet. App. at 41a, 40a (citing *United States v. Turkette*, 452 U.S. 576, 583 (1981)); *see also* Viacom Resp. Br. at 2-3 (referring to the management contracts).

This contractual relationship, standing alone, is plainly sufficient to meet the standard set out by this Court in *United States v. Turkette* that the association have "a common purpose of engaging in a course of conduct." 452 U.S at 583. Petitioners alleged, and proved at trial, that Viacom and the railroads signed contracts that committed the parties to a common purpose, leasing railroad property to outdoor billboard businesses. Pet. App. at 6a, 7a, 25a.

Though the Eighth Circuit cited *Turkette* to support its ruling, it ignored this Court's admonition regarding statutory interpretation: "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence

of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" 452 U.S. at 580.

The Eighth Circuit also ignored this Court's rejection of the First Circuit's attempted narrowing of association-in-fact enterprises to only "legitimate" associations. *Id.* at 580-81. But most importantly, it ignored this Court's simple expression of an association-in-fact enterprise as a group "associated together for a common purpose of engaging in a course of conduct" and this Court's oft repeated observation "that Congress opted for a far broader definition of the word 'enterprise,' and we are unconvinced by anything in the legislative history that this definition should be given less than its full effect." *Id.* at 583, 593.

At the heart of both the district court and the Eighth Circuit's errors is the section of the RICO statute that defines the phrases "racketeering activity," "person," and "enterprise." *See* 18 U.S.C. § 1961(4). Congress drafted the RICO statute to, among other things, prohibit persons from engaging in racketeering activity to acquire control over an otherwise legitimate enterprise or to conduct the affairs of an enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962. To further these objectives, Congress defined the term "enterprise" as including two general categories: legal entities (including corporations and partnerships) and associations of groups or individuals. 18 U.S.C. § 1961(4); *see also Turkette*, 452 U.S. at 581-82. Congress sought to protect these enterprises from those persons who sought to corrupt them through a pattern of racketeering activity. 18 U.S.C. § 1962.

It is unremarkable that the party corrupting the enterprise may have some goals that are inconsistent with its contractual obligations and that conflict with the goals of other members of the association-in-fact. The statute is aimed at preventing racketeers from corrupting enterprises, both "legal entities" and associations-in-fact. Thus, the corrupting influence that RICO is designed to deter presupposes *some* conflicting purposes. Just as a corporation's legitimate purposes may be undermined by a pattern of racketeering activity, so too would an association's purposes, but that fact does not relieve the racketeer of RICO liability.

For these reasons, it makes no sense to conclude—as the district court did—that the associations-in-fact that Congress sought to protect from racketeering, must have a common fraudulent purpose to constitute an "enterprise." This holding clearly violates the lesson of *Turkette*: "[o]n its face, the definition . . . include[s] both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises then it does legitimate ones." 452 U.S. at 580-81. For the same reasons, it makes no sense to conclude that the only associations-in-fact that Congress sought to protect from racketeering by defining them as "enterprises," are those with *all* purposes in common.

The Eighth Circuit correctly identified the definition that this Court adopted for association enterprises. Pet. App. at 40a. An association "enterprise is . . . a group of persons associated together for a common purpose of engaging in a course of conduct." *Turkette*, 452 U.S. at 583. It even cited

comparable language from the First and Eighth Circuits. Pet. App. at 40a. While all of these authorities use the phrase "a common purpose," none support the Eighth Circuit's conclusion that the existence of "divergent goals" of some members of an association—presumably even if there is a common purpose—is "fatal" to a RICO claim. Nor is there any support for this conclusion in the statute itself.

Just as in *Turkette*, "[c]onsidering . . . the Act's broad purposes, the construction of RICO suggested by respondent and the court below is unacceptable." 452 U.S. at 589. If the decision below is allowed to stand, in the Eighth Circuit "[w]hole areas of organized criminal activity [will] be placed beyond the substantive reach of the enactment." *Id.* All a RICO defendant will be required to do—in either a criminal or civil case—is point to a goal he did not share with the association as a whole, and he will be free of criminal or civil responsibility for his crime.

II. The Eighth Circuit's Decision Creates a Clear Circuit Split

Despite Viacom's attempts to harmonize clearly incompatible cases, the Eighth Circuit's opinion is in conflict with both the Sixth Circuit case *Williams v. Mohawk Industries, Inc.*, 465 F.3d 1277 (11th Cir. 2005), and the Second Circuit case *United States v. Orena*, 32 F.3d 704 (2d Cir. 1994).

Viacom claims that in *Mohawk*, the Sixth Circuit found an association-in-fact enterprise existed because the employer and third-party recruiters were "distinct entities that, at least according to the complaint, were

engaged in a conspiracy to bring illegal workers into this country." Viacom Resp. Br. at 18 (citing *Mohawk*, 465 F.3d at 1284). Thus, Viacom argues that the common purpose in *Mohawk* was to engage in the illegal conspiracy itself. *Id.* Viacom claims that the Eighth Circuit's decision in this case is entirely consistent with *Mohawk* because "whatever divergent purposes they may also have held, both the principal and the agents" shared the common purpose of engaging in an illegal scheme. *Id.*

First, *Mohawk* addressed more than the existence of an association-in-fact enterprise; it also addressed whether the association-in-fact enterprise shared a "common purpose." *Mohawk*, 465 F.3d at 1284. Thus, *Mohawk* addresses exactly the same question as does the Eighth Circuit's opinion in this case. Contrary to Viacom's representation, however, the Court in *Mohawk* found a "common purpose" because the employer and the third-party recruiters had a common purpose of "making money." *Id.* Thus, the common purpose identified in *Mohawk* was a pecuniary one—the conspiracy to bring illegal workers into the country was simply the means the parties employed to achieve their common purpose.

Mohawk is in direct conflict with the Eighth Circuit's holding in this case because Petitioners alleged and proved at trial that Viacom and the railroads had a *contractual relationship*, the aim of which was pecuniary gain. *See supra* at 3. That Viacom chose to pursue this common purpose through nefarious means is irrelevant. The RICO statute requires "a common purpose" and nothing more.

The Sixth Circuit expressly recognized this conflict when it noted that *Mohawk* conflicts with *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004), which the Eighth Circuit relied on in this case to impose its "no divergent goals" requirement to establish a common purpose. *Baker* held that it was a "fatal problem" that the employer in that case wanted to pay lower wages and the recruiters wanted to be paid more for their services, creating "divergent goals." *Id.* at 691.

The conflict the Sixth Circuit notes, in a sense, relates to the degree of abstraction at which courts should analyze the common purpose requirement. For example, the Sixth Circuit holds that "making money" is a common purpose sufficient for a RICO claim, even if the members of the enterprise have different financial interests. In contrast, the Seventh Circuit, and now the Eighth Circuit, hold that "making money" is not a common purpose, if members of an association-in-fact enterprise pursue the common purpose of making money in different ways. The Eleventh Circuit even noted this clear conflict in its opinion. *Mohawk*, 465 F.3d at 1285.

Similarly, the Eighth Circuit's "no divergent goals" requirement creates an unavoidable conflict with the Second Circuit's holding in *Orena*. Viacom attempts to distinguish *Orena* on the basis that the Mafiosi identified as enterprise members "indisputably shared the common purpose of advancing the enterprise's criminal activities," while the Eighth Circuit in this case found, as a purported matter of fact, that Viacom and the railroads shared no common purpose at all. Viacom Resp. Br. at 20. Like in

Mohawk, however, the common purpose in *Orena* was pecuniary—the members of the enterprise chose crime as the means of achieving this common purpose. *See Orena*, 32 F.3d at 710 (noting that, despite murderous dissention between the Mafiosi, they all sought to obtain the loansharking *proceeds*). Thus, again, the key to the common purpose in *Orena* was the desire for pecuniary gain—it did not matter that the Mafiosi pursued their common purpose of making money in different ways or, in fact, that certain members of the association sought to kill other members.

The Eighth Circuit's supposed "factual" finding that there was no common purpose between Viacom and the railroads is not factual at all. Viacom and the railroads clearly had a common purpose insofar as they had a contractual relationship, the object of which was pecuniary gain. Despite Viacom's attempts to disguise the holding as factual, the Eighth Circuit necessarily held, as a matter of law that the common purpose of leasing railroad sites for money is insufficient to constitute a RICO common purpose when the members of an enterprise attempt to further that common purpose in different ways. Thus, the Eighth Circuit's decision and the *Baker* case conflict with both *Mohawk* and *Orena*.

III. The Eighth Circuit Usurped the Jury's Fact-Finding Role and Ignored Key Evidence the Jury Relied Upon because of the Court of Appeals' Open Hostility to RICO

Viacom claims that the Eighth Circuit "correctly applied settled law in concluding that Petitioners presented insufficient evidence of a RICO pattern."

Viacom Resp. Br. at 22. In their response, Respondents Gustin and Kelly similarly argue that the Eighth Circuit correctly determined that Petitioners failed to provide sufficient evidence that the RICO scheme would continue. Kelly and Gustin Resp. Br. at 22-24. But this is clearly not the case. The Eighth Circuit held that, even if the individual defendants were engaged in a fraudulent scheme to take the best railroad sites for themselves, a Viacom form letter to *other* applicants effectively terminated the fraud by declaring that Viacom would grant licenses at its "sole discretion." Pet. App. at 45a.

The jury reviewed this same letter and concluded that it did not terminate the fraudulent scheme. The jury's conclusion is reasonable because the defendants presented no evidence that the form letter was sent to Petitioners, the letter did not elaborate on what the phrase "sole discretion" means, the letter did not identify who reviewed the applications, and—most importantly—it did not acknowledge that Viacom would take the best sites for itself. Pet. App. at 72a-73a.

While Viacom argued at trial that its form letter terminated the individual defendants' fraudulent scheme, the jury rejected that argument. Because the jury could have reasonably concluded that the form letter did not terminate the fraud, the Eighth Circuit had no basis to substitute its *post hoc* analysis for that of the jury. The Court of Appeals did not give the jury's verdict the extreme difference to which it is entitled. *See Galloway v. United States*, 319 U.S. 372, 395 (1943).

Respondents Kelly and Gustin argue that an appellate court's substitution of its own judgment for that of a jury's—regardless of how brazen—does not normally warrant this Court's attention. But the Eighth Circuit's open hostility to civil RICO suits—manifesting itself in usurping the jury's verdict—warrants review of this question contemporaneously with this Court's review of the Eighth Circuit's rewriting of the RICO enterprise requirements. As Petitioners asserted in their opening brief, "the Eighth Circuit's open defiance of controlling authority" requires this Court to reverse the Eighth Circuit's "Trojan-horse attempt[] to narrow [the scope of RICO] through appellate fact-finding." Pet. at 19.

Despite being reminded of the broad remedial scope of RICO, and this Court's recent admonition in *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2145 (2008), that the RICO statute is not to be narrowed, the Eighth Circuit, *en banc*, refused to reconsider its decision to override the jury's verdict in order to prevent an "ordinary civil dispute" from being resolved under the RICO statute. Pet. at 5. This Court should grant the petition not only to address the conflict the Eighth Circuit created regarding the definition of an association-in-fact, but also to ensure that Petitioners and future plaintiffs in the Eighth Circuit retain the right to pursue RICO relief for fraud perpetrated by businesses, a right this Court has repeatedly protected.

IV. Equitable Standing Is Required to Uphold the Broad Remedial Protections of RICO

Viacom again suggests that the decision on Petitioner Massood's standing to bring his claims is "fact bound." But each of the decisions in this case has been a ruling based on legal interpretations, not factual ones. Viacom Resp. Br. at 29. Mr. Massood has never been afforded the opportunity to pursue his claim in the federal or state courts. Moreover, Viacom ignores the adoption of the equitable standing rule in the Second and Third Circuits under the Securities and Exchange Act of 1934. *See* Pet. at 29-30.

Where RICO fraud leads to the purchase of a corporation victim, as Petitioner Massood alleged here, a court should grant equitable standing to permit a shareholder plaintiff the opportunity to present to a jury his claims that the sale price was driven down by the fraud. To hold otherwise will allow Viacom and similar defendants to benefit from their fraudulent conduct by driving down the value of a company's stock, buying the stock at the reduced value, and thereby stripping the former owner of standing. *See, e.g., Miller v. Steinbach*, 268 F. Supp. 255, 267 (S.D.N.Y. 1967).

CONCLUSION

The Court should grant this petition for certiorari and either schedule argument or vacate the Eighth Circuit's opinion and remand to the Eighth Circuit for reconsideration in light of *Bridge*, and grant such other relief as is just.

Respectfully submitted,

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